

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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In re Application of )

AMMERMANN et al. )

Serial No. 09/403,654 )

Filed: October 25, 1999 )

Group Art Unit: 1638 TECH CENTER 1600/2900

Examiner: KRUSE, D.

For: EXPRESSION OF FUNGICIDE-BINDING POLYPEPTIDES IN PLANTS FOR  
GENERATING FUNGICIDE TOLERANCE

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**REPLY BRIEF**

In response to the Examiner's Answer of August 16, 2002. Appellants maintain that the instant invention is described and enabled by the instant specification as filed.

The Examiner argues "that the process claimed by Appellant has not been adequately described because a critical feature of the process, that being a gene encoding BAS 490F-binding polypeptide has not been adequately described..." Appellants disagree. Appellants do not claim any and every gene encoding a BAS 490F-binding polypeptide. Rather, the BAS 490F-binding polypeptide of Appellants' claim 29 (directed to a process) is produced and isolated by the steps enumerated therein. Thus, knowledge of every gene encoding a BAS 490F-binding polypeptide is not necessary to practice the claimed invention. Even if the claims were directed to a

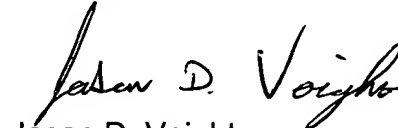
gene encoding a BAS 490F-binding polypeptide produced by enumerated steps, i.e. a product-by-process claim, "[w]here the process has actually been used to produce the product, the written description requirement for a product-by-process claim is clearly satisfied..." MPEP 2163 (enclosed, with quoted text underlined). Therefore, Appellants urge that the Examiner has not overcome the strong presumption that an adequate description of the invention is present when the application is filed.

Additionally, the Examiner appears to dismiss the Reindl Declaration as "Appellant's arguments." However, "[a] declaration or affidavit is, itself, evidence that must be considered." MPEP 2164.05. Such evidence "need not be conclusive but merely convincing to one skilled in the art." *Id.* The Examiner acknowledges that the Reindl Declaration provides general guidance for methods of producing antibody encoding genes and methods of transforming plants with those genes. This is commensurate with what Appellants claim. Again, Appellants do not claim all genes encoding a BAS 490F-binding protein, but rather claim a process wherein a gene encoding a BAS 490F-binding protein is produced and isolated by specific steps listed in the claims. Therefore, Appellants urge that the claimed invention has been enabled.

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Respectfully submitted,

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